

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**KALED HASSAN** : DETERMINATION  
for Revision of a Determination or for Refund of : DTA NO. 831242  
Cigarette Tax under Article 20 of the Tax Law for the :  
Period November 4, 2021. :

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Petitioner, Kaled Hassan, filed a petition for revision of a determination or for refund of cigarette tax under article 20 of the Tax Law for the period November 4, 2021.

On June 2, 2023, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition pursuant to 20 NYCRR 3000.9 (a) (4). The Division of Taxation, appearing by Amanda Hiller, Esq. (Laura Krzeminski, Esq., of counsel), submitted documents in support of dismissal. Petitioner, appearing pro se, did not submit a response by August 17, 2023, which date began the 90-day period for the issuance of this determination. After due consideration of the documents submitted, Donna M. Gardiner, Supervising Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner filed a timely petition with the Division of Tax Appeals following the issuance of a notice of determination.

***FINDINGS OF FACT***

1. The Division of Taxation (Division) issued to petitioner, Kaled Hassan, a notice of determination, dated July 18, 2022, bearing assessment number L-056579318, imposing penalty

under article 20 of the Tax Law in the amount of \$6,780.00, for the period November 4, 2021 (notice). The notice was addressed to petitioner at an address in Buffalo, New York.

2. On November 4, 2022, petitioner filed a petition with the Division of Tax Appeals in protest of the notice.

3. On June 2, 2023, the Division of Tax Appeals issued to petitioner a notice of intent to dismiss petition. The notice stated, in sum, that it appeared that the Division of Tax Appeals was without jurisdiction to consider the merits of the petition on the basis that the petition did not appear to be timely filed. The notice of intent to dismiss petition indicated that the notice was issued on July 18, 2022, but the petition was not filed until November 4, 2022, or in excess of 90 days later.

4. In response to the issuance of the notice of intent to dismiss petition and to show proof of mailing the notice, the Division submitted the following documents: (i) an affirmation, dated July 25, 2023, of Laura Krzeminski, an attorney employed by the Office of Counsel of the Division; (ii) an affidavit, dated July 11, 2023, of Marianna Denier, a Principal Administrative Analyst and the Director of the Division's Management Analysis and Project Services Bureau (MAPS); (iii) an affidavit, dated July 11, 2023, of Susan Ramundo, a manager in the Division's mail room; (iv) a "Certified Record for Presort Mail - Assessments Receivable" (CMR) postmarked July 18, 2022; (v) a copy of the notice of determination, dated July 18, 2022, together with the associated mailing cover sheet, that reflects a Buffalo, New York, address with zip code 14210; (vi) a copy of the petitioner's electronically filed New York resident income tax return, form IT-201, for the year 2019, filed on February 7, 2020; and (vii) a one-page Look Up a ZIP Code printout. The street address listed on the income tax return matches the street address on the notice, but uses the town of West Seneca, New York 14210 rather than Buffalo, New

York 14210 and is the last known address for petitioner at the time the notice was issued. Ms. Krzeminski states that she entered the zip code 14210 into the United States Postal Service (USPS) web page and her search resulted in the printout marked as attachment 5 to her affirmation. The printout notes that the zip code 14210 is used for Buffalo, New York, but can also be used for West Seneca, New York.

5. The affidavit of Marianna Denier sets forth the Division's general practice and procedure for processing statutory notices. Ms. Denier was the Supervisor of Administrative Analysis from July 2019 through August 2022 and has been the Principal Administrative Analyst and the Director of MAPS since August 2022. MAPS is responsible for the receipt and storage of CMRs. As a result of her duties in those positions, Ms. Denier is familiar with the Division's Case and Resource Tracking System (CARTS) and the Division's past and present procedures as they relate to statutory notices. Statutory notices are generated from CARTS and are predated with the anticipated date of mailing. Each page of the CMR lists an initial date that is approximately 10 days in advance of the anticipated date of mailing. Following the Division's general practice, this date was manually changed on the first and last page of the CMR in the present case to the actual mailing date of July 18, 2022. The pages of the CMR stay banded together unless otherwise ordered. The page numbers of the CMR run consecutively, starting with "PAGE: 1," and are noted in the upper right corner of each page.

6. All notices are assigned a certified control number. The certified control number of each notice is listed on a separate one-page mailing cover sheet, which also bears a bar code, the mailing address and the Departmental return address on the front, and the taxpayer assistance information on the back. The certified control number is also listed on the CMR under the heading entitled "Certified No." The CMR lists each notice in the order the notices are

generated in the batch. The assessment numbers are listed under the heading "Reference No." The names and addresses of the recipients are listed under "Name of Addressee, Street, and PO Address."

7. The CMR for July 18, 2022 consists of 23 pages and lists 242 certified control numbers along with corresponding assessment numbers, names and addresses. Each page of the CMR includes 11 such entries, with the exception of page 23 which contains zero entries. Ms. Denier notes that the copy of the CMR that is attached to her affidavit has been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding. A USPS representative affixed a postmark, dated July 18, 2022, to each page of the CMR, wrote the number "242" next to the heading "Total Pieces Received at Post Office" on page 23, and initialed or signed the last page of the CMR.

8. Page 19 of the CMR indicates that a notice with certified control number 7104 1002 9730 0617 2363 and reference number L-056579318 was mailed to petitioner at the Buffalo, New York, address. The corresponding mailing cover sheet, attached to the Denier affidavit as exhibit "B," bears this certified control number and petitioner's name and address as noted.

9. The affidavit of Susan Ramundo, a manager in the Division's mail room since 2017 and currently an associate administrative analyst whose duties include the management of the mail processing center staff, attested to the practices of the mail room with regard to statutory notices. The notices are received in the mail room and placed in the "Outgoing Certified Mail" area. Each notice in a batch is preceded by its mailing cover sheet and is accompanied by any required enclosures, and each batch includes its accompanying CMR. A member of the mail room staff retrieves the notices and associated documents and operates a machine that puts each statutory notice and associated documents into a windowed envelope so that the address and

certified number from the mailing cover sheet shows through the window. The staff member then weighs, seals and affixes postage and fee amounts on each envelope. A mail processing clerk thereafter checks the first and last pieces of certified mail listed on the CMR against the information contained on the CMR, and then performs a random review of up to 30 pieces listed on the CMR, by checking those envelopes against the information contained on the CMR. A staff member then delivers the envelopes and the CMR to one of the various USPS branches located in the Albany, New York, area. A USPS employee affixes a postmark and places his or her initials or signature on the CMR, indicating receipt by the post office. The mail room further requests that the USPS either circle the total number of pieces received or indicate the total number of pieces received by writing the number on the CMR. As noted, each page of the CMR attached to the Denier affidavit as exhibit "A" contains a USPS postmark dated July 18, 2022, and the USPS employee wrote the number "242" next to the heading "Total Pieces Received at Post Office" on page 23. In addition, she attests that the USPS employee's initials or signature appear on the last page of the CMR.

10. According to Ms. Ramundo, the affixation of the postmarks and the USPS employee's initials indicates that all 242 articles of mail listed on the CMR, including the article addressed to petitioner, were received by the USPS for mailing on July 18, 2022.

11. According to the Denier and Ramundo affidavits, the notice was mailed to petitioner on July 18, 2022, as claimed.

12. Petitioner did not respond to the motion.

## **CONCLUSIONS OF LAW**

A. In *Matter of Victory Bagel Time, Inc.* (Tax Appeals Tribunal, September 13, 2012), the Tax Appeals Tribunal held that the standard to employ for reviewing a notice of intent to dismiss petition is the same as that used for reviewing a motion for summary determination.

A motion for summary determination may be granted:

“if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party” (20 NYCRR 3000.9 [b] [1]).

B. Tax Law § 478 authorizes the Division to issue a notice of determination for assessments arising under article 20 of the Tax Law. A taxpayer may protest a notice of determination by filing a petition for a hearing with the Division of Tax Appeals within 90 days from the date of mailing of such notice (*see* Tax Law § 478). Alternatively, a taxpayer may contest a notice of determination by filing a request for a conciliation conference with the Bureau of Conciliation and Mediation Services “if the time to petition for such a hearing has not elapsed” (Tax Law § 170 [3-a] [a]). The 90-day statutory time limit for filing either a petition or a request for a conciliation conference is strictly enforced (*see e.g. Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal, May 15, 2003). A petition or request for a conciliation conference must be timely filed in order for the Division of Tax Appeals to have jurisdiction to consider the merits of the protest (*see Matter of Lukacs*, Tax Appeals Tribunal, November 8, 2007; *Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. Where, as here, the timeliness of a taxpayer’s protest of a notice is in question, the initial inquiry is whether the Division has carried its burden of demonstrating the date and fact of mailing the subject notice to petitioner’s last known address (*see Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). This means that the Division must show proof of a standard

mailing procedure and proof that such procedure was followed in the particular instance in question (*see Matter of New York City Billionaires Constr. Corp.*, Tax Appeals Tribunal, October 20, 2011). The Division may meet this burden by evidence of its standard mailing procedure, corroborated by direct testimony or documentary evidence of mailing (*see Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993).

D. Petitioner did not respond to the notice of intent to dismiss petition. As such, petitioner is properly deemed to have conceded that no question of fact requiring a hearing exists (*John William Costello Assoc. v Standard Metals Corp.*, 99 AD2d 227 [1st Dept 1984], *appeal dismissed* 62 NY2d 942 [1984]; *Kuehne & Nagel v Baiden*, 36 NY2d 539 [1975]).

Furthermore, as petitioner has presented no evidence to rebut the facts alleged in the Denier and Ramundo affidavits and supporting documents, the facts alleged therein are deemed admitted (*see Whelan v GTE Sylvania*, 182 AD2d 446, 449 [1st Dept 1992], citing *Kuehne & Nagel v Baiden*, 36 NY2d at 544).

E. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Denier and Ms. Ramundo, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing statutory notices.

The Division has also presented sufficient documentary proof, i.e., a properly completed CMR, to establish that the notice was mailed, as addressed, on July 18, 2022. Further, petitioner's address on the notice, the corresponding mailing cover sheet and the CMR all conform with the address listed on petitioner's 2019 tax return. This was petitioner's last known address prior to the issuance of the notice. Although the notice used Buffalo, New York, rather than West Seneca, New York, the Division introduced proof to indicate that the USPS

acknowledges that the zip code 14210 is used interchangeably for both West Seneca and Buffalo. Thus, it is concluded that the Division properly mailed the notice on July 18, 2022, and the statutory 90-day time limit to file either a request for conciliation conference with BCMS or a petition with the Division of Tax Appeals commenced on that date.

F. A taxpayer may protest a notice by filing a petition for a hearing within 90 days from the date of mailing of such notice (*see* Tax Law § 478). Here, the petition was not filed until November 4, 2022, a date that falls beyond 90 days after the July 18, 2022, date of issuance of the notice. Accordingly, the petition was untimely filed, and the Division of Tax Appeals is without jurisdiction to consider its merits (*see Matter of Lukacs*).

G. The petition of Kaled Hassan is dismissed.

DATED: Albany, New York  
November 9, 2023

/s/ Donna M. Gardiner  
SUPERVISING ADMINISTRATIVE LAW JUDGE